Date: 20090304

Docket: T-1000-08

Citation: 2009 FC 225

Ottawa, Ontario, March 4, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

OPASKWAYAK CREE NATION

Applicant

and

DEREK A. BOOTH AND BERNICE YOUNG (GENAILLE)

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, the Opaskwayak Cree Nation (First Nation), is an aboriginal First Nation and an Indian band. The respondent Bernice Young is a member of the First Nation who was employed by it as an Assistant Band Registrar from July 6, 1992 until January 17, 2007, when the First Nation dismissed her from her employment.

[2] Ms. Young filed a complaint under the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code") alleging unjust dismissal. The respondent Derek A. Booth (adjudicator) was appointed, pursuant to section 242 of the Code, to hear and adjudicate upon the complaint of unjust dismissal.

[3] The adjudicator found that there was no just cause for dismissal and ordered the First Nation to reinstate Ms. Young's employment and to pay to her all of the salary she had lost since the termination of her employment. This is an application for judicial review of that decision.

[4] While named a party to this application, the adjudicator entered no appearance.

[5] The First Nation alleges that the adjudicator's decision is unreasonable, that the hearing was conducted in a manner that was contrary to natural justice and that the adjudicator misconducted himself by having *ex parte* communications with a witness and Ms. Young.

[6] For the reasons that follow, the application for judicial review is dismissed with costs.

Background Facts

[7] On or about December 31, 2006, Ms. Young wrote a letter to the Chief and Council of the First Nation. The subject of the letter was "Gang-Members and Initiations of our Young people of [Opaskwayak Cree Nation] OCN." The letter was distributed among the membership of the First Nation by Ms. Young. In the letter, a number of assaults were described and individuals were

identified as having committed the assaults. In the passage of the letter that is central to this application, Ms. Young wrote:

> On December 30, 2006, [name redacted] ([name redacted]'s son) was assaulted outside [name redacted]'s house on Riverside Drive by [name redacted] and all his Indian Posse friends that were initiated into his so-called gang. Rumour is that [name redacted] born [birth date redacted] and [name redacted] born [birth date redacted] were both initiated into this gang. How many more of our young people of OCN are involved in this gang initiation.

[8] As a result of the distribution of Ms. Young's letter, the First Nation received a letter signed by three members of the First Nation. The letter contained a number of complaints, one of which was that Ms. Young had used the confidential Band registry information to obtain the two birth dates.

[9] This letter prompted the general manager of the First Nation to send a memorandum to Ms. Young in which he inquired as to the source of the birth date information.

[10] In a responding memorandum, Ms. Young stated that she had asked the mother of one individual about his birthday. She is said to have implied that she obtained the birth date of the other individual from his mother.

[11] On January 9, 2007, a special meeting of the Chief and Counsel of the First Nation was held and the December 31, 2006 letter was discussed with Ms. Young.

[12] Following the meeting, on January 10, 2007, the general manager sent Ms. Young a memorandum which set out the "tasks that came out of" the special meeting. Under the heading "Breach of Confidentiality" was written "This item has been addressed."

[13] On January 11, 2007, a restorative justice meeting was held.

[14] According to the general manager, he then learned from the mothers of the two individuals that neither had provided information to Ms. Young about their son's birth dates.

[15] By letter dated January 16, 2007, Ms. Young's employment was terminated for what was said to be a number of reasons.

The Decision of the Adjudicator

[16] The adjudicator noted that, in argument, counsel for the First Nation advised that the First Nation was relying only upon two grounds to uphold the termination: the misuse of confidential information and Ms. Young's dishonesty about the source of the birth date information.

[17] The adjudicator found Florence Constant, Ms. Young's immediate supervisor, to be the most compelling and reliable witness. No challenge is made to that finding of fact. Much of the evidence of Ms. Constant that the adjudicator relied upon was elicited from her in cross-examination by the First Nation's counsel. Ms. Constant testified that:

- She thought the December 31, 2006, letter was a good letter and it would "wake up" the Chief and Council.
- She was not consulted before Ms. Young's termination and she would not have terminated her employment.
- She would have given Ms. Young a warning and put her on a "very short leash."
- The use of names and birth dates was a minor matter. Birth dates and the full names of band members were reported in the local newspaper and were posted on band lists. She did not feel that they were privileged or private.
- Confidentiality should have been a "dead issue" after the January 9, 2007 special meeting.

[18] The general manager of the First Nation testified that he was unaware that band lists were posted in the community, and was unaware that names, birth dates and information were published regularly in the local newspaper.

[19] The First Nation's personnel policy provided, in section 1.12.4 that an employee would be subject to dismissal for just cause for "extreme or flagrant disciplinary offences." The adjudicator determined that Ms. Young's conduct was not extreme or flagrant and held that her conduct did not warrant dismissal. He noted that he was not satisfied that the lesser penalties found in section 1.12.1 of the personnel policy would not have been sufficient.

[20] Ms. Young did not testify before the adjudicator. Rejecting the submission of counsel for the First Nation that an adverse inference should be drawn from her failure to testify, the adjudicator

stated that even if Ms. Young had testified and evidence came out on cross-examination confirming "the worst case scenario as argued by the employer", dismissal would still not be justified.

[21] The Adjudicator also noted the following weaknesses in the Band's argument:

- Had the general manager known of the publication and use of band lists, perhaps he would not have been concerned about "this minor breach of confidentiality."

- The First Nation exaggerated the concern of the community about the confidentiality issue and the effect of the alleged breach of confidentiality. While the First Nation claimed that the use of the names and birth dates caused a great deal of upset, it appeared to only have affected five people. Further, there was no evidence that the publication caused damage to the named individuals.

- The First Nation ignored Ms. Young's apology at the January 9, 2007 special meeting and the consensus was that the matter was resolved at the restorative justice meeting on January 11, 2007 (if it had not already been settled at the special meeting on January 9, 2007).

[22] With respect to the appropriate remedy, the evidence of both Ms. Constant and Judith Head (Ms. Constant's supervisor) was to the effect that there were no impediments to Ms. Young's reinstatement. Thus, the adjudicator ordered that her employment be reinstated retroactive to the date of termination.

Standard of Review

[23] The first asserted error attacks the adjudicator's determination that the dismissal was unjust and his choice of remedy. These are questions of mixed fact and law. I am required to consider whether the existing jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to such determinations. See: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraphs 57 and 62.

[24] In my view, the jurisprudence has settled this question. Questions of mixed fact and law decided by adjudicators appointed under section 242 of the Code are reviewable on the standard of reasonableness. See: *Colistro v. BMO Bank of Montreal* (2008), 378 N.R. 288 at paragraph 6 (F.C.A).

[25] As noted above, Ms. Young did not testify before the adjudicator, but called witnesses and made submissions to the adjudicator. The second alleged error is based on the assertion that the adjudicator made findings of fact based not on the evidence, but rather based upon submissions made by Ms. Young. This is said to have breached principles of natural justice. Procedural fairness is a broad category which to some extent overlaps with the traditional principles of natural justice. No standard of review applies to procedural fairness questions. It is for the Court to provide the legal answer to such questions. See: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100.

[26] An alternate way of expressing the second error is to allege that the adjudicator made findings of fact without regard to the evidence. This is an error of law also reviewable on the standard of correctness. Thus, either characterization of the second asserted error leads to the conclusion that no deference is owed to the adjudicator when considering this alleged error.

[27] The third alleged error, the allegation of *ex parte* communication, constitutes an allegation of bias or reasonable apprehension of bias. Again, no deference is owed to the adjudicator on this issue of procedural fairness.

Application of the Standard of Review

Was the decision unreasonable?

[28] The decision to reinstate Ms. Young is said to be unreasonable because:

a. Ms. Young disclosed confidential information and lied to her employer.

b. By stating "[i]f she had disclosed on cross examination […] the worst case scenario as argued by the employer, it would still not justify the dismissal" the adjudicator "has found that even if the Plaintiff [*sic*] was guilty of all the facts enumerated in the termination letter, it would not warrant a dismissal."

c. The adjudicator "rewarded the complainant by reinstating her and awarding her total monetary compensation by ordering that she be paid her full salary from the date of her dismissal to the date of her reinstatement." The jurisprudence is said not to support such a conclusion.

[29] Review on the reasonableness standard requires an inquiry into the qualities that make a decision reasonable. Those qualities include the process of articulating the reasons and the outcome. On judicial review, reasonableness is largely concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. See: *Dunsmuir*, paragraph 47.

[30] The First Nation's personnel policy provided that an employee would be subject to dismissal for "extreme or flagrant disciplinary offences." The adjudicator determined that Ms. Young's conduct was not extreme or flagrant and so did not warrant dismissal. These conclusions were supported by the evidence before the adjudicator, particularly the evidence of Ms. Young's superior, Ms. Constant, that the use of birth dates was a minor matter in view of their presence on public band lists and in the local newspaper, and that she would have not terminated Ms. Young, but rather would have given her a warning. The conclusions were also supported by the evidence before the adjudicator that First Nation staff had accidentally e-mailed 138 pages of personal information of First Nation members (including names and birth dates) to one Mia LaJambe, but no disciplinary action resulted.

[31] None of the affidavits filed in support of the application put in issue the adjudicator's summary of the evidence of the witnesses before him.

[32] The reasons of the adjudicator are justified by the evidence, transparent and intelligible. The decision falls within a range of permissible, acceptable outcomes which are defensible on the facts and the law. The adjudicator's decision is, therefore, reasonable.

[33] Turning to the adjudicator's remarks about the "worst case scenario", contrary to the argument of the First Nation, the adjudicator did not accept the correctness of all of the allegations contained in the January 16, 2007 letter which terminated Ms. Young's employment. Counsel for the First Nation was clear in his submission to the adjudicator — only two grounds of dismissal were relied upon. Thus, any other matters referred to in the January 16, 2007 letter were irrelevant and were not accepted by the adjudicator.

[34] In the impugned passage, the adjudicator declined to draw an adverse inference from Ms. Young's failure to testify. In this regard, the evidence was that birth date information was not closely held, but rather was published on band lists. Therefore, it was not unreasonable for the adjudicator to state that even if Ms. Young had testified that she had obtained the information about birth dates from band records, publication of two birth dates would not have warranted dismissal.

[35] With respect to Ms. Young's failure to testify about how she obtained the birth dates, one individual's mother testified that Ms. Young may well have asked her for the information. Ms. Young had never said that the other individual's mother told her what her son's birth date was. What Ms. Young had written to her employer was "[name redacted] is the mother of [name redacted] and she is a friend of mine and she is fully aware that her son is associated, but would

rather stay out of it she claims that Chief & Counsel cannot do anything about it anyway." It was open to the adjudicator to conclude that even if Ms. Young had admitted that she was vague or misleading in her response on this point, the evasion was obvious and would not justify dismissal.

[36] As for the remedy awarded, subsection 242(4) of the Code sets out the jurisdiction of an adjudicator where he or she decides that a person has been unjustly dismissed. Specifically:

242(4) Where an adjudicator decides pursuant to subsection(3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	242(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	b) de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[37] The decision to reinstate, with reimbursement for lost wages, was reasonable in light of the evidence of Ms. Constant and Ms. Constant's supervisor Ms. Head, that there were no impediments to Ms. Young's reinstatement.

[38] Reinstatement is also consistent with the jurisprudence. In *Sheikholeslami v. Atomic Energy of Canada Ltd.*, [1998] 3 F.C. 349 (C.A.) Justice Létourneau acknowledged, at paragraph 31, that reinstatement is not a right after a finding of unjust dismissal. However, he cautioned that any exception to reinstatement should be applied carefully. Otherwise, the risk exists that an unjustly dismissed employee could be penalized by losing his job. In the same case Justice Marceau, Justice Strayer concurring, noted that, in practice, reinstatement is the remedy favored in order to "make whole" an employee's losses caused by dismissal.

[39] The adjudicator did not "reward" Ms. Young's behavior. Rather, he restored her to the position she would have been in, but for the wrongful dismissal. The adjudicator did not find Ms. Young to be blameless. He was simply persuaded that a lesser penalty would have sufficed.

[40] As for the jurisprudence relied upon by the First Nation, three cases are listed in its written submissions, but none was discussed in the submissions or at any length in oral argument.

[41] I have already referred to the decision in *Sheikholeslami*. While it is true that reinstatement was not ordered in that case, the nature of the employee’s dishonesty and deception makes the case distinguishable from this case.

[42] The First Nation relies upon *Di Vito v. MacDonald Dettwiler & Associates Ltd.* (1996), 21 C.C.E.L. (2d) 137 (B.C.S.C.). There, the Court did cite with approval the proposition that "[d]ishonesty is always cause for dismissal […]. It is the employer's choice whether to dismiss or

forgive." However, this rather draconian view must be tempered by the subsequent decision of the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161. There, a unanimous Court stated that whether dishonesty warrants dismissal requires an assessment of the context of the alleged misconduct. The test is whether the dishonesty gave rise to a breakdown in the employment relationship (see paragraph 48). The evidence of Ms. Constant and Ms. Head in this case does not support any such breakdown.

[43] The final case relied upon by the First Nation is *Waldman v. Eskasoni Band Council*, [2001] F.C.J. No. 1228 (F.C.). The case is of no assistance as no issue arose as to the propriety of the adjudicator's decision not to reinstate the employee's employment, and so, there was no analysis of this issue. The cases are factually distinguishable.

Did the adjudicator make findings of fact not based on the evidence?

[44] The evidentiary basis of this contention is the assertion of the affiant Mr. Denis Valdron that "[w]hen I received the Adjudicator's report […] it was apparent to me that the Adjudicator considered and made findings with respect to the matter based on the testimony given by Bernice Young during her argument, notwithstanding my previous objections."

[45] I have carefully read pages 19 to 21 of the adjudicator's reasons where he summarized the argument advanced by Ms. Young. Remembering that there were only two grounds for dismissal before the adjudicator, I can see no statement by Ms. Young that touches upon either where she obtained the birth date information from, or what she told the First Nation about the source of this

information. Much of what is summarized on these pages is proper argument based upon the evidence.

[46] It may be that the adjudicator accepted Ms. Young's statement as to why she wrote the letter of December 31, 2006. To some extent, the motive for sending the letter is apparent from its text. However, even if the adjudicator accepted as a fact Ms. Young's submissions as to motive, that was not relevant to the issue of unjust dismissal as framed by the First Nation.

[47] The First Nation has failed to establish that any material finding of fact was not based upon the evidence before the adjudicator.

Was there improper *ex parte* communication?

[48] The evidence on this issue is not disputed.

[49] Mia LaJambe is not a member of the First Nation. She was the recipient of the 138 pages of the First Nation members' information accidentally sent by e-mail by First Nation staff. She testified about the circumstances of the receipt of that information, and testified that she had not deleted the information because she wanted proof of who sent it. After giving such testimony she was approached outside the hearing by counsel for the First Nation. He asked if she had further objection to deleting the information and she apparently agreed to delete the information. On May 2, 2008, she contacted counsel for the First Nation to advise that the adjudicator had directed her not to delete the information until June 1, 2008.

[50] On May 2, 2008, counsel for the First Nation wrote to the adjudicator to express his concern about the adjudicator's direction and to ask for an explanation.

[51] On May 8, 2008, counsel for the First Nation again wrote the adjudicator. In that letter he stated that he had not received any response to his earlier letter and that "I take the view that the Elections List in the possession of a third party, even of Ms. LaJambe, is a matter for concern." Counsel's letter dealt solely with concerns about the security of information. No concern was expressed about the fact of an apparent *ex parte* communication.

[52] By letter dated May 12, 2008, the adjudicator responded. He advised that:

- On the final day of the hearing, Ms. LaJambe had approached him in a restaurant during the lunch break. She asked if she should delete the information she had received.
- The adjudicator advised her to retain the information until June 1, 2008, because the information was "in a sense, evidence, or at least referred to in the evidence." The June 1, 2008 date was selected by the adjudicator as he anticipated that he should have rendered his decision by then and "if anything turned on it, it would still be in existence."
- The adjudicator also wrote "[i]f [counsel for the First Nation] wishes to make anymore of an issue about this, I will hear representations from both parties."

- The adjudicator also advised that on May 2, 2008, Ms. Young had telephoned him at his office. Ms. Young told the adjudicator that after the close of the hearing on April 30, 2008, she had been approached by counsel for the First Nation and she wanted the adjudicator's legal advice.
- The adjudicator advised her that he could not give her legal advice. He referred her to a particular lawyer at a Winnipeg law firm.

[53] On May 30, 2008, the adjudicator rendered his decision.

[54] During oral submissions before me, counsel for the First Nation argued that this conduct gave rise to a reasonable apprehension of bias.

[55] In my view, no reasonable apprehension of bias has been established for the following reasons.

[56] First, the law is well-settled that any allegation of bias must be made as soon as reasonably possible in the circumstances. A party may not wait until informed of the decision and then advance an allegation of bias. See, for example, *Colistro*, cited above, at paragraph 3; *Rong v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 242 at paragraph 31 (F.C.).

[57] In the present case, counsel for the First Nation knew of the conduct now said to give rise to a reasonable apprehension of bias before the adjudicator rendered his decision. However, there is

no evidence that counsel responded to the adjudicator's offer to hear representations about his direction, and no evidence of any complaint after the adjudicator disclosed the fact of, and the content of, Ms. Young's telephone call.

[58] Second, the test as to whether a reasonable apprehension of bias exists is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude." See: *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394.

[59] In my view, no informed person would perceive any apprehension of bias on the facts set out above. Ms. Young, who was not represented, ought not to have contacted the adjudicator. However, after the contact was made, the adjudicator responded appropriately to Ms. Young and disclosed such contact to the First Nation before rendering his decision. I find nothing inappropriate in the adjudicator's response to Ms. LaJambe.

Conclusion

[60] For these reasons, the application for judicial review will be dismissed.

[61] Both the First Nation and Ms. Young seek costs. I am satisfied that costs should follow the event. In response to an inquiry made by the Court, counsel for the respondent suggested costs fixed in the amount of $2,000.00, plus applicable taxes. Counsel for the First Nation did not disagree.

[62] I fix costs in the amount of $2,000.00, all inclusive. This lump sum corresponds generally to costs set at the mid-point of column III of the table to Tariff B of the *Federal Courts Rules*.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. The Opaskwayak Cree Nation shall pay to Bernice Young (Genaille) costs fixed in the amount of $2,000.00, all inclusive.

"Eleanor R. Dawson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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